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In The

Supreme Court of the United States

October Term, 1984

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Petitioner,

vs.

CLAUS VON BULOW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

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QUESTIONS PRESENTED FOR REVIEW

1. When a private party seizes several pieces of evidence, subjects some of them to chemical testing and delivers the evidence to police, does the Fourth Amendment require police to obtain a warrant before conducting independent chemical tests?

2. If the police officer receiving pieces of physical evidence is aware that the defendant's privacy interest in the evidence has already been substantially compromised by private seizure, private examination and private chemical testing, does the Exclusionary Rule announced by this Court in *Mapp v. Ohio,* 367 U.S. 643 (1961), and modified in *United States v. Leon,* No. 82-1771 (U.S. July 5, 1984), require the suppression of the results of subsequent warrantless chemical analysis conducted by police?

3. Whether the trial court's refusal to suppress the results of warrantless chemical tests conducted by police on evidence that was privately searched, seized, examined, and chemically tested was harmless error?

4. Whether the judgment of the Rhode Island Supreme Court is supported by an adequate and independent state law basis?

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Now comes the State of Rhode Island and Providence Plantations, by its attorney, and prays that this Honorable Court issue a writ of certiorari to the Supreme Court of Rhode Island to review said court's erroneous decision of federal constitutional questions.

OPINION OF COURT BELOW

The opinion of the Supreme Court of Rhode Island, as modified, is reproduced in Section A of the appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered on April 27, 1984. A petition to reargue was timely filed on May 2, 1984. The petition to reargue was denied in an order dated May 24, 1984. Jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1257(3) and by the Rules of the Supreme Court of the United States R. 17.1(b) (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the following constitutional and statutory provisions involved in this case are set out in Section D of the appendix in accordance with Rule 21.1(f): U.S. Const. art. III, sec. 2; U.S. Const. amend. IV; U.S. Const. amend. XIV, sec. 1; R.I. Const. art. I, sec. 6; 28 U.S.C. sec. 1257(3).

STATEMENT OF THE CASE

I. Factual Background

Martha von Bulow lies comatose in a New York hospital: a silent, helpless victim of her unfaithful husband's

attempts to end her life, capture her fortune, and marry his mistress. A Newport, Rhode Island, jury convicted Claus von Bulow of twice attempting to murder his wife. Reviewing the record of von Bulow's trial, the Rhode Island Supreme Court found ample evidence that von Bulow had injected his wife on two occasions with potentially lethal doses of insulin, designed to induce her death and to free him to marry his lover. Despite their confidence in the evidence of von Bulow's guilt, the court held that the trial justice had erred in failing to suppress certain evidence as violative of von Bulow's Fourth Amendment rights. Although the offending evidence was largely cumulative, the court concluded that Fourth Amendment principles required reversal of von Bulow's conviction.

The State of Rhode Island, Petitioner herein, submits that the Rhode Island Supreme Court erred in reversing von Bulow's conviction. Petitioner suggests that the court decided important matters of federal law in a manner contrary to cases decided by this Court,[1] and in conflict with the decisions of the highest courts of other states and decisions of federal courts of appeals.[2] For the foregoing reasons, Petitioner prays that this Honorable Court issue a writ of certiorari to the Supreme Court of Rhode Island to review that court's erroneous decision of important federal constitutional questions.

A. *The First Coma.* During December of 1979, Martha von Bulow was celebrating the Christmas season with her

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[1] *United States v. Jacobsen,* 104 S.Ct. 1652 (1984); *See United States v. Leon,* No. 82-1771 (U.S. July 5, 1984); *Nix v. Williams,* No. 82-1651 (June 11, 1984).

[2] *United States v. Barry,* 673 F.2d 912 (6th Cir. 1982), *cert. denied,* 103 S.Ct. 238 (1983); *Commonwealth v. Varney,* 391 Mass. 34 (1984); *People v. Adler,* 50 N.Y. 2d 730, 409 N.E.2d 888 (1980); *See State v. Ortiz,* No. 8636 (Hawaii May 23, 1984).

family at Clarendon Court, her Newport, Rhode Island vacation home. Present for the holidays were her husband, Claus von Bulow, (the Respondent herein); their daughter, Cosima; and Mrs. von Bulow's son and daughter by a previous marriage, Alexander von Auersperg and Annie Laurie (Ala) Kneissl. Maria Schrallhammer, Mrs. von Bulow's personal maid, was also in Newport that December. On December 26, 1979, Martha von Bulow suffered an unexplained coma. Alexander testified that he had sat with his mother that evening as she sipped holiday eggnog in the library at Clarendon Court. (Tr. VI-1021) Alexander noticed his mother's voice becoming weak and that she had difficulty walking. (Tr. VI-1020-1026) The young man helped his mother to her bedroom, where he told von Bulow of her problems. (Tr. VI-1027) Von Bulow left the room and returned with a drink for his wife. (Tr. VI-1028) When Alexander left his mother that evening, she was in her bedroom, conscious and talking with her husband. (Tr. VI-1030)

The next morning, Mrs. von Bulow's maid, Maria Schrallhammer, was surprised that her employer had not rung for breakfast by 9:30. (Tr. VIII-323) Von Bulow intercepted Maria and discouraged her from checking on his wife's condition. (Tr. VIII-325) When Maria's persistence resulted in her discovery that Mrs. von Bulow was unconscious and breathing with difficulty, Claus von Bulow refused to call a doctor. (Tr. VIII-327 to 330) Von Bulow finally spoke to the doctor in the afternoon. Maria overheard him misrepresenting his wife's symptoms and condition. (Tr. VIII-344) Mrs. von Bulow's local physician arrived in the early evening, finding his patient unconscious, barely breathing, and in need of mouth-to-mouth resuscitation. (Tr. VI-1040; VIII-346 to 348) After a brief stay at Newport Hospital, Mrs. von Bulow recov-

ered and returned to her year-round home in New York. (Tr. VI-1043) The cause of her December 1979 episode remained a mystery.

B. *Claus von Bulow's Black Bag.* Von Bulow's strange behavior—refusing at first to call for medical help and later reporting false symptoms—did not go unnoticed by his wife's maid, Maria Schrallhammer. (Tr. VIII-344, 369) A few months after the December 1979 incident, Maria was cleaning a closet in the von Bulow's New York apartment. (Tr. VIII-365) In one of Claus von Bulow's travel bags, she observed a small black bag containing pills, powders, and liquids. (Tr. VIII-367) Maria showed some of these items to Mrs. von Bulow's daughter, Ala, who arranged to have them chemically analyzed. (Tr. VIII-384) In November 1980, Maria again noticed the small black bag among Claus von Bulow's things. (Tr. VIII-386) On this occasion Maria saw a hypodermic syringe, several needles and a bottle labeled "insulin". (Tr. VIII-388 to 389) Confused by the presence of insulin, Maria summoned Alexander to show him her discovery. Maria again saw the black bag in December 1980 as she helped the family prepare to go to Newport for the holidays. Tr. VIII-391) This time the bag contained, in addition to the insulin and needles, a greenish liquid. (Tr. VIII-392)

C. *The Second Coma.* As Christmas of 1980 approached, a smaller group gathered at Clarendon Court. Ala was not present, having married that previous summer. Maria Schrallhammer was also absent. She had planned to accompany the family for the holidays, but Claus von Bulow had insisted that his wife's maid take a few days off and remain behind in New York. (Tr. VIII-406) On the evening of December 20, 1980, Alexander sat with his mother in the library at Clarendon Court as the two had

done the previous December. (Tr. VI-107) Von Bulow joined them briefly offering his wife a bowl of soup. (Tr. VI-1075) Alexander noticed that after his mother consumed the soup her voice became weak, much as it had a year earlier. (Tr. VI-1077) Attempting to stand, Mrs. von Bulow staggered. (Tr. VI-1079) Alexander once again helped his mother to her bedroom. (Tr. VI-1081) The young man summoned Claus von Bulow to alert him to his wife's condition. (Tr. VI-1081) Eventually Alexander left his mother and von Bulow conversing in the bedroom. (Tr. VI-1083)

The following morning, Maria's absence—effectuated by von Bulow's insistence that his wife's maid stay behind in New York—prevented her normal 9:30 a.m. check on her employer. Around 11:00 a.m., Alexander met von Bulow in the hallway and inquired about his mother's condition. (Tr. VI-1090) Von Bulow expressed surprise that his wife had not yet appeared for breakfast. (Tr. VI-1090) Von Bulow shortly summoned Alexander (Tr. VI-1091) into Mrs. von Bulow's bathroom, where the two men found her lying unconscious on the cold floor. (Tr. VI-1092) Von Bulow summoned emergency medical help, and his wife was again taken to Newport Hospital. (Tr. VI-1095) Unlike the previous year's incident, however, Martha von Bulow never recovered from her December 1980 coma. When Alexander von Auersperg testified in February, 1982, his mother remained hospitalized in an unconscious state.[3] (Tr. VI-994)

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[3] At trial, Doctor George Cahill, a professor of medicine of Harvard Medical School and former Director of Boston's prestigious Joslin Research Laboratories, testified as an expert for the prosecution. (Tr. XIX-2679 to 2730). Doctor Cahill told the jury that based upon his expert knowledge of insulin and blood sugar, his examination of Martha von Bulow's medical history and records led to the conclusion that both of her comas were caused by infusions of exogenous insulin. (Tr. XIX-2714 to 2724).

D. *Von Bulow's Motive to Kill His Wife.* At trial, the prosecution offered evidence that von Bulow had attempted to kill his wife so that he could capture her fortune and marry his mistress. The evidence showed that if his wife died, von Bulow would inherit a substantial portion of his wife's formidable estate. Included in his inheritance would be Clarendon Court, the New York apartment, $2.5 million in cash, and annual interest from a $7.5 million trust principal. (Tr. XIX-2844-54) Alexandra Isles testified that she and von Bulow had fallen in love early 1979. (Tr. XVII-2170) In late spring of 1979, Mrs. Isles delivered an ultimatum: if von Bulow was serious about marrying her, he should "make the break" from his wife within six months. (Tr. XVII-2172) This ultimatum expired some time before Mrs. von Bulow's first coma. By November of 1980, shortly before his wife's second coma, von Bulow again proposed marriage to Mrs. Isles. He assured her of his intention to end his marriage to Mrs. von Bulow. (Tr. XVII-2185) Within a month the second coma occurred.

II. Facts Regarding Search Issue

A. *The Private Search.* Suspicious of von Bulow's involvement in his mother's condition, Alexander went with a private detective, Edwin F. Lambert, to Clarendon Court on January 23, 1981, to retrieve the black bag and its contents from von Bulow's closet. They found a set of keys in von Bulow's study, one of which opened the closet. Alexander discovered a vial in the desk and another in the pocket of a coat belonging to von Bulow. One of these vials was empty, the other contained a powder. (Tr. II-326, 418) Beneath a low shelf, on the floor of the closet, Lambert discovered an unlocked, black metal box containing the black bag. (Tr. II-324) Alexander examined the bag's contents discovering the following items:

one hypodermic syringe (Tr. II-470); three needles, two of which were sealed in plastic containers (Tr. II-425); two orangeish containers with white tops (Tr. II-423), one containing a blue-green liquid, the second containing a number of different pills (Tr. II-470-471); and ampoules in little plastic packages. (Tr. II-423) In addition, the pair found inside the metal box a cardboard box marked "Lidocaine". (Tr. II-423)

B. *Private Chemical Tests.* When Alexander returned to New York, he examined the black bag and its contents with Dr. Kuh. (Tr. VII-40, 41) Later, Alexander gave the items to his mother's personal physician, Dr. Stock, for analysis. (Tr. II-472) As a result of chemical tests conducted by the family before the police became involved, Mrs. von Bulow's private doctor learned that the needle found in the black bag had been encrusted with Insulin, Amobarbital and Diazepam (Valium). (Tr. XVII-2227, 2251) The powder found in von Bulow's pill vial was a preparation of Amobarbital. The blue-green liquid was a mixture of Amobarbital and Diazepam (Valium). (Tr. XVII-2251 to 2252) Both the liquid and the powder had been altered from the commercial state of pharmaceutical preparation. (Tr. XVII-2337) On the basis of this information, Dr. Stock felt compelled to contact police authorities. (Tr. XVII-2336)

C. *Tests by State Officials.* On March 13, 1981, Alexander met with Sgt. John F. Reise of the Rhode Island State Police. (Tr. IV-658) He gave the black bag to Reise and, in Reise's presence, removed the contents of the bag, which the policeman catalogued in accordance with department procedures. (Tr. IV-659) Reise knew that the contents of the bag had been visually examined by Alexander and others. (Tr. IV-667) He also knew that certain items had been chemically tested by private meth-

ods. (Tr. IV-667) He was unsure, however, which items had been tested. (Tr. IV-672) Thus, Sgt. Reise sent the liquid and the powder, which had previously been tested by Dr. Stock, to the state toxicologist for further testing. (Tr. IV-659 to 60) Among the other items found within the black bag was a prescription vial in the name of C. von Bulow and labeled "Dalmane". (Tr. IV-660) Reise noted that inside the vial were sixty-five pills of different varities. Thirty-one orange-yellow capsules were imprinted with the word "Dalmane". (Tr. XVI-2010) By referring to the *Physician's Desk Reference* (PDR), Reise confirmed the standard color and markings for Dalmane capsules. (Tr. IV-660) An additional 31 light blue tablets were imprinted with the words "Roche 10 Valium". (Tr. XVI-2011) Using the *PDR,* Reise confirmed the identity of these blue tablets as Valium. (Tr. IV-664) In addition, Reise found one blue capsule labeled "Lilly F33", which the *PDR* identified as Amytal, and one red capsule marked "Lilly F40", which the *PDR* identified as Seconal. (Tr. IV-664) Reise sent one each of these pills to the state toxicology lab, together with a clear glass ampoule labeled "Papaveretum" and the Lidocaine which had been in a cardboard box outside the black bag. The State toxicology analysis confirmed the accuracy of the private chemical tests and Sgt. Reise's plain view identification in all respects save one.[4] The red capsule labeled "Lilly F40", had been identified by the PDR as Seconal. Chemical analysis revealed the presence of Secobarbital, Amobarbital and Cyclizine.

Before Sgt. Reise ordered any state toxicological test, each and every item related to the black bag had already

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[4] The results of the private chemical test, plain view identification, and state toxicology test are collected in tabular form in section F of the Petitioner's Appendix. App. F, at 87.

been fully identified either by the strictly private chemical analysis (needle, powder, and blue-green liquid); by the reading of labels as Alexander had done (Dalmane, Lidocaine, and Papaveretum); or by plain view observation in connection with the *PDR* (Dalmane, Valium, Amytal, Seconal). Moreover, Reise knew that in the form they were possessed, some of the items sent for testing were contraband. *See* R.I.Gen.L., Sec. 21-28-3.29 (controlled substances may not be possessed except in original container).

Before trial, von Bulow sought to suppress the black bag, its contents and results of all chemical tests conducted by private parties and public officials. The trial justice conducted lengthy evidentiary hearings. (Tr. II-189 to IV-673) Claiming that private parties had seized the evidence illegally, von Bulow argued that the Fourth Amendment required suppression. (Tr. IV-687) The trial judge orally denied the motion, holding that the Fourth Amendment had no application to the conduct of private parties. (Tr. IV-704) Moreover, the court reasoned that further testing by police was neither a search within the meaning of the Fourth Amendment nor unreasonable. (Tr. IV-729) On appeal, von Bulow raised the private search and state chemical tests as violative of his Fourth Amendment rights. *See* Appellant's Brief at 53. The Rhode Island Supreme Court agreed that the initial private seizure and private chemical testing were beyond constitutional scrutiny. With regard to police chemical tests, however, the court reasoned that these tests constituted an independent search that should not have been conducted without a warrant. The court held that the Fourth Amendment compelled reversal of von Bulow's conviction.[5]

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[5] See App. A for remaining issues discussed by the court.

ARGUMENT

I. The Warrantless Chemical Tests Did Not Violate the Fourth Amendment

This Court first discussed the applicability of the Fourth Amendment to private searches and seizures in *Burdeau v. McDowell,* 256 U.S. 465 (1921). This Court reasoned that the seizure of evidence by private individuals—even if wrongful—was outside the scope of the Fourth Amendment Exclusionary Rule. *Id.* at 476. More recently, this Court has considered the propriety of police examination and testing of items initially seized or searched by private parties.

In *United States v. Jacobsen,* 104 S.Ct. 1652 (1984), this Court held that in measuring the reasonableness of police conduct, a court must view the facts as they existed at the time an official invasion occurred. *Id.* at 1657. To the extent that private search activity frustrates an expectation of privacy, government conduct coextensive with the private activity triggers no Fourth Amendment scrutiny. Moreover, the reasonableness of further governmental activity will be measured by the degree to which it exceeded the scope of prior private conduct. *Id.* at 1657. Whatever a defendant's subjective hope for secrecy, only those expectations of privacy that "society is prepared to consider reasonable" merit Fourth Amendment protection. *Id.* The Court reasoned that a chemical test for the presence of cocaine—the possession of which can never be legitimate—compromises no legitimate expectation of privacy. *Id.* at 1662. Thus, the Court concluded that the chemical test conducted in *Jacobsen* infringed no constitutionally protected privacy interest. *Id.* at 1663.

In this case, the initial "government invasion" occurred when the black bag and its contents were deliv-

ered to Sgt. Reise. The presence of insulin, Amobarbital and Diazepam (Valium) on the used needle had been exposed by Dr. Stock's private chemical tests. (Tr. XVII-2227, 2251) The identity of the blue-green liquid and the powder had been revealed as pharmaceutically altered preparations of Amobarbital and Diazepam (Valium). (Tr. XVII-2251 to 52, 2337) Subsequent state toxicology analysis of these items neither expanded upon the private search nor impinged any remaining expectation of privacy. *See Jacobsen,* 104 S.Ct. at 1658 (once frustration of original privacy interest occurs, Fourth Amendment permits government use of now non-private information).

The remaining items had never been privately chemically tested. Nevertheless, von Bulow's remaining expectation in their privacy had been substantially vitiated by the items themselves and by private conduct with respect to them. *Cf. Jacobsen,* 104 S.Ct. at 1660 (police had already learned "a great deal" about package prior to chemical test). First, the Lidocaine, Papaveretum, Dalmane and Valium bore markings declaring their identity, fully visible to Alexander when he examined the contents of the black bag. Items that are visually identifiable, like the proverbial gun case, *Arkansas v. Sanders,* 442 U.S. 753, 764 n.13 (1979), can scarcely support any measurable expectation of privacy. The item itself is fully admissible and the jury would certainly be free to read its label. The likelihood that subsequent chemical analysis of these items "will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment." *Jacobsen,* 104 S.Ct. at 1662. The other items contained in the black bag—one blue "Lilly F33" capsule, and one red "Lilly F40" capsule—had also been visually examined by Alex-

ander and Dr. Kuh. (Tr. VII-40, 41) Von Bulow's trial counsel conceded that the Fourth Amendment did not preclude Sgt. Reise from identifying these items via the *PDR*[6]. No supportable expectation of privacy remained as a bar to chemical analysis of these items. Thus, the subsequent state toxicology test violated no expectation of privacy that society is prepared to recognize as reasonable.

The analysis advocated above contrasts sharply with the voyage embarked upon by the Rhode Island Supreme Court. Rather than examining von Bulow's privacy interest as it existed at the initial government intrusion, 104 S.Ct. at 1657, the Rhode Island Supreme Court eschewed *Jacobsen's* principles[7] in favor of von Bulow's original expectation of privacy in his locked closet. App. A at 45. The von Bulow court ignored the fact that several of the items were clearly labeled and could therefore support no colorable expectation of privacy. Moreover, in its zeal to avoid the mandate of *Jacobsen* the Rhode Island court refused to recognize defense counsel's concession that Sgt.

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[6] "MR. FAHRINGER [defense counsel]: In the context of this case, your Honor, I agree, because *Walter* really makes this clear. Had the officers in this case merely taken the material and looked at it and said 'Hm, that's Dalmane. That's Valium,' maybe even gone to the Physicians' Desk Reference and verified those things, that would have been fine. I have to say in all candor, they would have not gone beyond the scope of the private search." (Tr. IV-723).

[7] This Court decided *United States v. Jacobsen* on April 2, 1984, 104 S.Ct. 1652 (1984). *State v. von Bulow* had been argued in October of 1983. Accordingly, the Rhode Island Supreme Court's treatment of *Jacobsen* was without the benefit of oral argument or extensive briefing. Although both parties did provide cursory supplemental correspondence regarding *Jacobsen, see* Section E. of Petitioner's Appendix, the important *Jacobsen* opinion never received the careful discussion that normally occurs in appellate briefs and arguments. This matter was raised, to no avail, in the state's petition to reargue *See* App. B, at 64.

Reise was free to identify items in the black bag by use of the *PDR*.

Furthermore, the Rhode Island Supreme Court ignored the objective reasonableness of the test at its inception. Instead, the court fastened upon the subjective test results that showed that one red capsule's chemical identity did not conform to Sgt. Reise's plain view identification. This approach contravenes the caveat in *Jacobsen* that the reasonableness of chemical testing is never dependent upon the results of a particular test. 104 S.Ct. at 1662. Moreover, the *von Bulow* court's result-oriented approach is simply illogical. The Rhode Island Supreme Court would invalidate a search which, although reasonable at its inception, produced surprising results. A labeled pill capsule openly declares the nature of its content; it cannot support any reasonable expectation of privacy. This Court has noted that:

> some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view", thereby obviating the need for a warrant." *Arkansas v. Sanders,* 442 U.S. 753, 764 n.13

Cf. Jacobsen, 104 S.Ct. at 1661 (distinguishing subjective hope for secrecy from protected expectation of privacy; Fourth Amendment protects only latter). Examination of a labeled capsule's contents is reasonable at its inception and violates no Fourth Amendment interest—even if the results of that examination conflict with the examiner's expectation. *See Jacobsen,* 104 S.Ct. at 1662 (propriety of chemical test is not contingent upon results of test).

In rejecting *Jacobsen,* the *von Bulow* court misperceived the facts as they existed when Alexander delivered

the black bag to Sgt. Reise. *See United States v. Jacobsen*, 104 S.Ct. at 1657 (police conduct must be viewed in light of facts at time police acted):

1. von Bulow had secreted in a locked closet a suspicious black bag known to contain a syringe, needles and a variety of drugs;
2. private chemical tests revealed that a used needle within the black bag contained traces of Insulin, Amobarbital and Diazepam;
3. private analysis also revealed the presence of pharmaceutically altered preparations of Amobarbital and Diazepam;

From this evidence, the inferences of von Bulow's criminal conduct were overwhelming, unlike *Jacobsen* where police conduct regarding the seized items was essential to the determination that any crime had been committed. Moreover, in focusing upon the subjective importance of the state toxicology report rather than the degree to which it exceeded the scope of prior conduct, the court misapplied this Court's definition of "significant expansion".[8] Public conduct significantly expands upon prior

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[8] The Rhode Island Supreme Court candidly exposed its own carelessness with regard to the relationship between the state toxicology report and von Bulow's expectation of privacy. In response to the state's petition to reargue, see App. B, the court admitted that the court's original opinion had misstated the facts regarding one particular pill analyzed by the state toxicologist:

> "Concededly, this particular pill was obtained by the State Police on April 21, 1981, while searching with defendant's consent, the family's Newport home." *State v. von Bulow*, No. 82-462-C.A. (May 24, 1984 order), App. C., at 68.

That such a factual error could have appeared in the court's opinion reinforces the Petitioner's argument that the court failed to consider von Bulow's actual expectation of privacy in measuring the conduct of the police. *See United States v. Jacobsen*, 104 S.Ct. at 1657, 1660 (fact that defendant's privacy has been substantially compromised prior to police action is highly relevant to reasonableness of police conduct).

private conduct only when it impinges upon a remaining expectation of privacy that society is prepared to recognize as reasonable. *Jacobsen,* 104 S.Ct. at 1661. Von Bulow's remaining expectation of privacy in the contents of pill capsules that were plainly identifiable by label can only be described as marginal. *See Jacobsen,* 104 S.Ct. at 1662. Under such circumstances "the safeguards of a warrant would only minimally advance Fourth Amendment interests." *Jacobsen,* 104 S.Ct. at 1663. Petitioner submits that the warrantless chemical test was therefore reasonable, *id.,* and the trial judge correctly refused to suppress the state toxicology results. Accordingly, the judgment of the Rhode Island Supreme Court must be reversed.

II. The Exclusionary Rule Should Not Apply In This Case

This Court announced the Fourth Amendment Exclusionary Rule in *Weeks v. United States,* 232 U.S. 383 (1914), and *Mapp v. Ohio,* 367 U.S. 643 (1961). The Court has recently recognized that the philosophical underpinnings of the exclusionary rule sometimes will not support its application to exclude reliable, probative evidence obtained in technical violation of the Fourth Amendment. *Massachusetts v. Sheppard,* No. 82-963 (U.S. July 5, 1984); *United States v. Leon,* No. 82-1771 (July 5, 1984). The principles endorsed in *Sheppard* and *Leon* suggest that the application of the exclusionary rule in this case is inappropriate.

In *Leon,* this Court recognized that adherence to the truth-finding role of judges and jurors sometimes requires that the propriety of the exclusionary sanction be measured in light of the magnitude of the alleged police misconduct:

> "Particularly when law enforecement officers have acted in *objective good faith or their transgressions*

> *have been minor*, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." *Id.* slip op. at 8. (emphasis added)

Any transgressions that occurred in this case were minor. Moreover, Sgt. Reise acted in objective good faith in sending the contents of the black bag to the state toxicologist. Accordingly, Petitioner suggests that the exclusionary rule should not be applied in this case.

This Court recognized in *Leon* that the purpose of the Fourth Amendment exclusionary rule is to deter official misconduct. *See id.*, slip op. at 7. The Court reasoned that as with all remedial devices, the rule ought to be tailored appropriately to attain its objectives. In cases, therefore, involving substantial and deliberate Fourth Amendment violations, the application of the rule remains unchecked. In *Leon* the Court concluded that police had relied in good faith on an apparently valid warrant. *Id.* at 14. The warrant was later determined to be improper. The Court reasoned that when evidence has been seized in the reasonable good faith belief that the seizure was permissible, a proper balance suggests that the exclusionary rule should be relaxed. *Id.* at 9.

An examination of the facts as they existed when Sgt. Reise first ordered a toxicology analysis, *Jacobsen*, 104 S.Ct. at 1657, reveals that his belief that no warrant was necessary was bona fide and reasonable. First, Sgt. Reise knew that the black bag had been seized by private parties. (Tr. IV-670 to 672) Such a seizure could not violate the Fourth Amendment. *E.g., Burdeau v. McDowell, supra.* Sgt. Reise was also aware that Alexander von Auersperg had examined the contents of the bag and that private chemical tests had been conducted on several items. (Tr. IV-670 to 672) Remaining items in the bag were identifiable by plain view examination in connection with the

PDR. In the form possessed, some of the items were contraband. R.I. Gen. L. Sec. 21-28-3.29. Based on this state of affairs, Sgt. Reise reasonably concluded that no warrant was necessary to conduct chemical analysis of the contents of the black bag. The trial judge agreed with Sgt. Reise holding that the policeman's conduct was neither unreasonable nor violative of the Fourth Amendment. (Tr. IV-729) Sgt. Reise's conduct unquestionably passes the *Leon* test for objective good faith. *Leon* at 8-9.

In addition to satisfying *Leon's* good faith requirement, Sgt. Reise's conduct qualifies for the *Leon* exception because any transgression of the Fourth Amendment by Sgt. Reise's bona fide conduct can only be described as minor. *Id.* The black bag and its contents were fully exposed to Sgt. Reise by virtue of private activity. Private chemical tests had revealed the insulin encrusted needle (the most incriminatory evidence against von Bulow) and the identity of other items connected to von Bulow and the black bag. Remaining items within the black bag were fully identifiable simply by reading their labels or by plain view in connection with the *PDR.*[9] The likelihood that testing of these items by the state toxicologist would compromise any remaining legitimate expectation of privacy "seems much too remote to characterize the testing as a search subject to the Fourth Amendment." *Jacobsen,* 104 S.Ct. at 1662.

This Court must weigh Sgt. Reise's objective good faith and the minor nature of any potential Fourth Amendment transgression against the substantial societal costs exacted in reversing von Bulow's conviction. *See Leon,*

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[9] Von Bulow's trial counsel conceded that such conduct was permissible under the Fourth Amendment. Note 6 *supra.*

slip op. at 8-9; *Stone v. Powell*, 428 U.S. 493, 494-95 (1976). The trial of this case consumed six weeks of precious judicial time. The impact of any Fourth Amendment violation on the original trial can only be described as marginal.[10] An examination of the evidence remaining after suppression reveals the essentially cumulative nature of the state toxicology report and a concomitant absurdity in the application of the exclusionary rule to require a new trial in this case. The physical items of evidence—the black bag and its contents—remain fully admissible. The Rhode Island Supreme Court correctly concluded that the seizure of these items by private parties implicates no Fourth Amendment rights. The highly probative evidence regarding an insulin encrusted needle will therefore reach the jury at a second trial. The jury will be free to read the labels on those items that declare their contents. In addition, the liquid and the powder were fully identified by private analysis, and these results must also reach the jury without Fourth Amendment objections. Von Bulow has conceded that the remaining items—the blue amytal capsule and the red seconal capsule—may be identified by reference to the *PDR*. Because the state toxicology analysis revealed for the first time that the red capsule had been altered, conceivably this fact may be kept from the jury at a second trial. The fact that other drugs within the black bag had been mixed or altered from their state of pharmaceutical preparation, however, will be admissible as a result of the private chemical analysis. Thus, virtually,

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[10] Petitioner is, of course, confident of the evidence of von Bulow's guilt. Reviewing the record, The Rhode Island Supreme Court found ample admissible evidence to support the jury's verdict. Viewed in this light it seems highly likely that von Bulow would be convicted again on retrial. In measuring the societal cost of the exclusionary rule this Court should not be unmindful of the effect of such a retrial on all actors—even the defendant. As Chief Justice Burger has sug-

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every piece of information that came before the jury as a result of the state toxicology test will be fully admissible by collateral means on retrial. A new trial would do nothing whatever to promote the integrity of the judicial process, but would inflict a wholly unacceptable burden on the administration of criminal justice. *Nix v. Williams* slip op. at 14.

Another potential occurrence at retrial is the possibility that von Bulow will testify for the first time in his own defense. If he does so he will presumably claim—in accordance with his position at trial and on appeal—that the black bag and its contents never belonged to him. Of course, if von Bulow eschews a possessory interest in the black bag his standing to assert Fourth Amendment rights evaporates. Under this scenario the application of the exclusionary rule to vacate his present convictions would be especially perverse.

Finally, in weighing the social cost of applying the exclusionary rule to this case, the victim must not be ignored. The societal benefit of vindicating Claus von Bulow's marginal privacy interest pales in comparison to the societal cost if Martha von Bulow's attacker escapes justice:

> "The rhetoric of some civil libertarians to the contrary, it *is* worse to be murdered or raped than to have one's house searched without a warrant, no matter how aggravated the latter violation." Cameron & Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.R.D. 109, 145 (1984).

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gested, guilty defendants sometimes suffer an additional measure of cruelty when their inevitable punishment is delayed by continuous litigation based on hopeless legal technicalities. *Sullivan v. Wainwright*, 104 S.Ct. 450, 452 (1983) (concurring opinion by Burger, C.J.).

If Martha von Bulow were conscious, no doubt she would speak volumes about the events of December 21, 1980. Despite her present medical condition, Mrs. von Bulow, like all citizens, is entitled to equal protection of the laws. U.S. Const., Amend. 14. Reversal of her attacker's conviction on the basis of a marginal invasion of his barely visible privacy interest raises serious questions about our judicial system's ability to fulfill that promise. A balance of the benefits and costs of the exclusionary rule reveals marginal benefit while creating a substantial risk of general disrespect for the law and the administration of justice. *Leon, supra* slip op. at 8.

Petitioner submits that the exclusionary rule should not be applied in this case.

III. The Denial of the Motion To Suppress Was Harmless Error

This Court has recognized that when small errors or defects have little effect on the result of a trial, they should properly be regarded as harmless:

> "[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse,* position than they would have been in if no police error or misconduct had occurred." *Nix v. Williams,* No. 82-1651 (U.S. June 11, 1984), slip op. at 10 n.4. (emphasis in original)

The Court has also held that when an error of constitutional magniture occurs, the error will be considered harmless upon a showing that it was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967). Of course, objectionable evidence that has a source independent of any police misconduct must be exempted from harmless error computation, because the information reached the jury free of constitutional taint.

See Nix slip op. at 10. Thus, in measuring the harm resulting from the alleged error, the Rhode Island Supreme Court should have considered those pieces of information that were learned only as a result of the warrantless chemical test. *See* App. F at 87 (summarizing test results in tabular form).

Independent of the state test the jury heard overwhelming evidence on von Bulow's guilt. Information regarding his desire to terminate his marriage, his questionable conduct surrounding both comas, his suspicious possession of insulin and other drugs, and the insulin encrusted needle all came before the jury independent of the state toxicology test. The only new fact that the jury learned from the state toxicologist was that one red capsule had been tampered with. Clearly, from this evidence the jury could have inferred that von Bulow had tampered with the drugs in his black bag. This information was essentially cumulative of the fact, revealed by the permissible private tests, that other items in the black bag had also been pharmaceutically altered. Had the red capsule's contents been kept from the jury there would be little likelihood of a different result at trial. *See Nix* slip op. at 10 n.4.

It can scarcely be contended that the jury would have found the prosecution's case "significantly less persuasive" without the test of the red capsule. *See Schneble v. Florida,* 405 U.S. 427, 432 (1972). The Rhode Island Supreme Court, however, rejected the prosecution's harmless error analysis without considering the collateral admissibility of most of the evidence contained in the state toxicology report. The court focused instead upon the general importance of chemical tests to prove that von Bulow had possessed various drugs and may have used them on his wife. Ample evidence independent of the State toxicology

test was introduced to prove this fact. In sum, virtually every piece of information contained in the state toxicology report is admissible by independent means. Any error that occurred in the trial court's refusal to suppress these results must be deemed harmless beyond a reasonable doubt. Because the Rhode Island Supreme Court erred in finding harmful error, the court's judgment must be reversed.

IV. The Judgment of The Rhode Island Supreme Court is Not Supported by An Adequate and Independent State-Law Basis

In his appeal to the Rhode Island Supreme Court, von Bulow argued that the private search violated the Fourth Amendment and Article I, section 6 of the Rhode Island Constitution. The court concluded that the trial justice had erred in failing to suppress the toxicology report. The court analyzed further to determine whether this constitutional error was "harmless beyond a reasonable doubt," applying the standard announced by this Court in *Chapman v. California,* 386 U.S. 18, 23-24 (1967). The court concluded that adherence to Fourth Amendment principles required reversal of von Bulow's conviction. App. A at 34. The court noted in addition that Art. I, Section 6 of the Rhode Island Constitution presented an adequate and independent basis for the decision to suppress the evidence contained in the state chemical report. App. A at 47. The Petitioner recognizes that the Rhode Island Supreme Court's citation of the state constitution gives rise to an inference that the court's judgment is supported by state law. Nevertheless, Petitioner claims that this portion of the Court's opinion is dependent upon the court's federal law analysis and that the state law theory cannot stand alone to support the court's judgment. Accordingly,

the Petitioner claims that this court has jurisdiction to review the federal constitutional errors complained of.

This Court's application of the "adequate and independent" theory has not been without difficulty. Surveying the law in 1983, Justice O'Connor observed:

> "Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue." *Michigan v. Long,* 103 S.Ct. 3469, 3474 (1983).

In *Long* the Supreme Court of Michigan had invalidated a protective search of the passenger compartment of a vehicle, purporting to rest its decision on the Fourth Amendment and Article 1, sec. 11 of the Michigan Constitution.

This Court recognized that the state court's citation to its own constitution presented a question whether the state court's decision was supported by adequate and independent state law theories. *Id.* at 3474.[11] The Court noted initially that the question whether a state court's judgment rests upon adequate and independent grounds is

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[11] In cases involving federal constitutional issues a state court may not insulate itself from review by mere citation to state laws that are not legally sufficient to support its judgment. *Williams v. Georgia,* 349 U.S. 375, 399 (1955) (Clark, J., dissenting); *Chicago, B. & Q.R.R. Co. v. Illinois,* 200 U.S. 561 (1906).

This Court will examine the lower court's opinion to determine whether the alleged state law basis in fact supports the state court's judgment:

> "[T]he federal ground being present, it is incumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Bryon,* 282 U.S. 765, 774 (1931).

an issue of federal law that this Court must resolve for itself. *Id.* The Court candidly admitted that the manner in which this inquiry had historically been conducted was less than satisfactory. The Court announced a rule to apply to cases involving state and federal issues:

> "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the State court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 3476.

In applying this test to the *Long* case, the Court concluded that the state court's judgment rested primarily upon federal law. *Id.* at 3477. Citation to the state's own constitution was insufficient support for the Michigan Court's judgment. Accordingly, this Court proceeded to consider the merits of the federal issues presented in the case.

The Petitioner does not dispute that the *opinion* of the Rhode Island Supreme Court offered an alternative basis for the suppression of evidence in this case. This Court, however, is empowered to review judgments, not opinions. *Herb v. Pitcairn,* 324 U.S. at 126. Accordingly, the Petitioner focuses upon the *judgment* entered by the *von Bulow* Court. The Rhode Island Supreme Court vacated the judgment of conviction and remanded the case for a new trial. It is the province of this Court to examine and to correct state court judgments "to the extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn,* 324 U.S. 117, 126 (1945). The fundamental question is "whether the asserted non-federal ground *supports the judgment.*" *Abie State Bank v. Bryan,* 282 U.S. 765, 773

(1931) (emphasis added). By comparing the *von Bulow* court's discussion of federal issues with its state law analysis, it becomes clear that the Rhode Island Supreme Court failed to undertake the analyses necessary to supports its judgment with state constitutional theory.

The *von Bulow* court, in its federal law section, concluded that the conduct of private parties is outside the reach of the Fourth Amendment. The court next considered the conduct of police authorities in testing certain items recovered by the private search. Defects in the court's Fourth Amendment analysis are discussed elsewhere in this petition. Suffice it to say, the logic and reasoning of the court's constitutional discussion led the court to conclude that von Bulow was entitled to a new trial free of the illegally obtained evidence. In essence, the court undertook a two-pronged analysis. One part of the analysis involved the conclusion that the warrantless toxicology test violated the Fourth Amendment and that the trial judge committed error in refusing to suppress. The other prong of the anlysis resulted in the conclusion that this error was sufficiently harmful to von Bulow to require reversal of his conviction. In applying a harmless error analysis to the facts of the case, the court referred to *Chapman v. California,* 386 U.S. 18, 23-24 (1967). Reasoning that the evidence in this case failed the *Chapman test,* the court rejected the state's harmless error argument. Having found a Fourth Amendment violation that could not be considered harmless error, the court concluded that "defendant's conviction must be reversed." App. A at 47.

An examination of the Rhode Island Supreme Court's state constitutional analysis reveals that the court never concluded that the state constitution required reversal of

von Bulow's conviction. The court noted first that Article 1, section 6, of the Rhode Island Constitution provides special protection to the privacy of citizens of Rhode Island. The court went on to conclude that the trial justice had erred, under state constitutional principles, in refusing to suppress the evidence. App. A at 51. Of course, this conclusion alone is insufficient to support the court's judgment of reversal. The Rhode Island Supreme Court has previously held that errors of state constitutional dimension will require reversal only when harmful to the defendant. *State v. Benoit,* 417 A.2d 895 (R.I. 1980). Moreover, in analyzing state constitutional issues, the Rhode Island court eschews the *Chapman* "beyond reasonable doubt" standard in favor of a more relaxed standard. *Id.* at 901. In analyzing the state constitutional error, however, the court in *von Bulow* never applied any harmless error standard.

The Petitioner submits that without any analysis to determine the effect of the alleged state constitutional error on the jury, principles of state law cannot support the reversal of von Bulow's conviction. A judgment of reversal requires two findings. First, the court must find that an error occurred. Second, the court must determine that the error was harmful. Both of these steps are necessary to assure that convictions are set aside only for errors that have a measurable effect on the trial. *See Nix v. Williams, supra,* slip op. at 10 n.4. The *von Bulow* court identified an error of state constitutional law, but never took the second necessary to require reversal. The court neither analyzed nor concluded that the state constitutional error was harmful. Absent a harm analysis, the state law issue is *inadequate* to support the judgment of reversal. Von Bulow will undoubtedly argue that the harmless error

analysis undertaken by the state court in its discussion of federal law adequately resolved this issue. Such an argument, however, renders the state constitutional analysis *dependent* upon the court's determination of federal constitutional issues. Where a state court's disposition of state law issues is interwoven with matters of federal law or compelled by the state court's interpretation of federal law, this Court has consistently held that there is no bar to a full review of the federal constitutional issues raised. *See, e.g., Michigan v. Long,* 103 S.Ct. 3469, 3476 (1983) (where state issue interwoven with federal issue, Supreme Court may determine federal questions); *Delaware v. Prouse,* 440 U.S. 648, 653 (1979) (when state court's resolution of state law depends upon federal issues, Supreme Court has jurisdiction to review case); *Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109 (1924) (state law issue is not insulated from federal review if state court felt compelled by interpretation of federal law); *Murdock v. City of Memphis,* 87 U.S. 590 (1873) (Supreme Court will review state court decisions when state law is not sufficient to support judgment).

The Petitioner submits that the state law issue in this case is inadequate to support the judgment of the Rhode Island Supreme Court. Accordingly, this Court has jurisdiction to correct the important errors of federal law made by the Rhode Island Supreme Court.

CONCLUSION

The Rhode Island Supreme Court found substantial evidence that Claus von Bulow had twice attempted to murder his wife by injecting her with potentially lethal doses of insulin. Despite its confidence in von Bulow's

guilt, the Court invoked the Fourth Amendment exclusionary rule to reverse von Bulow's conviction. In doing so, the *von Bulow* court misconstrued this Court's applicable case law. Moreover, the court gave an unduly broad application to the exclusionary rule, despite this Court's concern that the exclusionary remedy be carefully tailored to suit the goal of deterring police misconduct. This overreaching application of the exclusionary rule constitutes a disservice to the victim and the parties in this case while creating a substantial risk of public disrespect for law and the administration of justice. For these reasons, the judgment of the Rhode Island Supreme Court must be reversed. The Petitioner prays that writ of certiorari issue to the Supreme Court of Rhode Island to review that Court's erroneous decision of federal constitutional issues.

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